

# Washington University Law Review

---

Volume 90

Issue 3 *Hodge O'Neal Corporate and Securities Law Symposium: The Future of Class Actions*

---

2013

## The Role of the Judge in Non-Class Settlements

Howard M. Erichson

*Fordham University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Law Commons](#)

---

### Recommended Citation

Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol90/iss3/11](https://openscholarship.wustl.edu/law_lawreview/vol90/iss3/11)

This Commentary is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# THE ROLE OF THE JUDGE IN NON-CLASS SETTLEMENTS

HOWARD M. ERICHSON\*

What is the role of the judge in aggregate litigation? That was the question posed to Judge Alvin Hellerstein and several panelists, including myself, at the 2012 Symposium of the Institute of Law and Economic Policy. Judge Hellerstein, who has overseen the litigation arising out of both the September 11 terrorist attacks and the subsequent rescue efforts and clean-up, framed the question more provocatively and purposively: “How do you bring justice to ten thousand cases?”<sup>1</sup>

The justice that Judge Hellerstein brought to ten thousand cases in the September 11 clean-up litigation took the form of a massive settlement.<sup>2</sup> Responders who participated in recovery and debris-removal efforts and who suffered respiratory diseases and other ailments had sued New York City and other defendants, claiming that the city had failed to provide adequate protective gear and supervision. Rather than a class action, this was a mass non-class aggregate settlement. Plaintiffs’ liaison counsel negotiated the deal with New York City after several individual cases had been scheduled for trial but before any case had been tried. The resolution was accomplished on a non-class basis because the court had earlier denied class certification on the grounds that the claims were too individualized for class action treatment.<sup>3</sup> In the denial of class certification and the subsequent accomplishment of a mass non-class settlement, the outcome was typical of the past decade’s major mass tort resolutions.<sup>4</sup>

---

\* Professor, Fordham University School of Law. The ideas in this commentary were presented at the 2012 symposium of the Institute for Law and Economic Policy in response to Judge Alvin Hellerstein’s account of his management of the September 11 clean-up litigation. The author thanks the Institute and Washington University School of Law for sponsoring the symposium, and thanks Judge Hellerstein and co-panelists Tobias Wolff and Donald Migliori for their provocative ideas.

1. Alvin Hellerstein, Presentation at Institute for Law and Economic Policy Symposium, Bahia Beach, PR (Apr. 27, 2012).

2. See Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES (Nov. 19, 2010), [http://www.nytimes.com/2010/11/20/nyregion/20zero.html?\\_r=0](http://www.nytimes.com/2010/11/20/nyregion/20zero.html?_r=0) (reporting that the 95 percent participation threshold had been met for a settlement between \$625 million and \$712.5 million to resolve over 10,000 claims).

3. *In re World Trade Center Disaster Site Litig.*, 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (citing Transcript of Status Conference at 31–34 (S.D.N.Y. Oct. 28, 2004)).

4. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 559 (E.D. La. 2009) (discussing settlement of approximately 50,000 individual claims); *In re Zyprexa Prods. Liab. Litig.*, 649 F. Supp. 2d 18, 22 (E.D.N.Y. 2009) (discussing 2005 settlement of about 8,000 individual claims, and noting that “[t]he settlement resolved virtually all cases then pending in the MDL, along with

But the signal moment of the September 11 clean-up litigation was not typical at all. In March 2010, Judge Hellerstein “rejected” a settlement that the attorneys had negotiated.<sup>5</sup> He sent the parties back to the bargaining table to make the settlement richer. Sure enough, several months later the lawyers returned with a settlement proposal that increased plaintiffs’ compensation, and this time the judge “approved” it.<sup>6</sup> To many observers, there may be something quite appealing about the court’s intervention. The judge helped World Trade Center responders and clean-up workers obtain greater compensation, and the defendant was willing to pay the higher amount rather than go to trial.

What I wonder is where the judge got the power to “approve” or “reject” the settlement. I understand, of course, why a judge might *wish* he had that power. Overseeing a case gives a judge a strong investment in the outcome as well as a sense of what outcome might be just. But settlement is not adjudication.<sup>7</sup> A settlement is a contract in which a claimant agrees to release a claim in exchange for something offered by the defendant.<sup>8</sup> There are special circumstances that require judicial approval of negotiated resolutions; these circumstances turn settlements into something akin to adjudication.<sup>9</sup> But the September 11 clean-up litigation deal was not a class action settlement. It was not a consent judgment in which the parties sought the court’s ongoing supervision. It was not a settlement by minors or others legally incompetent to make their own decisions. Nor was it a shareholder derivative action or an action in which a receiver had been appointed. Rather, it was a settlement of individual claims, albeit in the context of a complex mass dispute.

Judge Hellerstein and his special masters—Professors James Henderson and Aaron Twerski—have described in a detailed law review article the challenges they faced in bringing ten thousand claims to

---

some state cases”). For a notable exception, see *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 2012 WL 6652608 (E.D. La. Dec. 21, 2012) (certifying a settlement class action to resolve BP’s liability for the Gulf of Mexico oil spill).

5. See Mireya Navarro, *Federal Judge Orders More Talks on 9/11 Deal*, N.Y. TIMES, Mar. 19, 2010.

6. See Mireya Navarro, *U.S. District Court Approves Ground Zero Health Settlement*, N.Y. TIMES, June 24, 2010, at A28.

7. On the increasingly blurry line between adjudication and settlement, see Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117, 1123–27 (2009).

8. It bears emphasizing not only that settlement decisions belong to parties rather than the court, but also that the settlement decision belongs to the clients, not their lawyers. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2(a), R. 1.8(g).

9. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14 (2004) (discussing various contexts requiring judicial settlement approval).

resolution.<sup>10</sup> Their reflections provide an apt occasion for considering the role of the judge in bringing a mass dispute to a negotiated resolution.

### I. JUDICIAL MANAGEMENT TO FACILITATE SETTLEMENT

The judge and special masters took several important steps that set the stage for settlement, and these steps nicely illustrate the ways in which effective judicial management of complex litigation can pave the way to a negotiated resolution.<sup>11</sup> Relatively early in the proceedings, the judge and special masters instituted a phased discovery process with a “core discovery order” requiring plaintiffs and defendants to provide certain essential information.<sup>12</sup> The order required each plaintiff to answer questions regarding, among other things, “where and when the plaintiff worked . . . [on] debris removal,” “the availability of . . . protective equipment,” and the plaintiff’s injuries, and it required each plaintiff to provide medical records.<sup>13</sup> Information from these responses, as well as information from the defendants, was entered into a database that the court ordered the parties to establish.<sup>14</sup> The core discovery and resulting database, by providing essential information about each claimant, by allowing an overview of the litigation, and by making it possible to sort cases by severity, undoubtedly facilitated the settlement process.

Not only did the court require the parties to provide information that would be useful for either adjudication or settlement, the court also proceeded to schedule a number of individual bellwether trials. Bellwether trials are a well-established and sound approach to encouraging settlement in mass tort litigation. The idea is not that the verdicts in the early trials will bind other litigants through extrapolation or issue preclusion,<sup>15</sup> but rather that those verdicts will provide data points that can assist parties in

---

10. See Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127 (2012); see also Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database*, 90 WASH. U. L. REV. 653 (2013).

11. As they put it in their article, “it is possible to identify important steps along the way that moved the parties from what appeared to be a stalemate in December, 2007 to the presentation to the court of a settlement agreement in early March, 2010.” Hellerstein et al., *Managerial Judging*, *supra* note 10, at 142.

12. *Id.* at 142–44 (citing Clarifying Order Regulating Discovery at 2–4, *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100(AKH) (S.D.N.Y. Nov. 27, 2007)).

13. *Id.*

14. *Id.* at 146–48 (citing Order Regarding Database Objections, *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100(AKH) (S.D.N.Y. Jan. 5, 2009)).

15. For a case in which the district court tried sample claims for extrapolation to other claimants but was reversed on appeal, see *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998).

determining settlement values for purposes of negotiating a comprehensive deal.<sup>16</sup>

In their article, the judge and special masters explain in detail the process they employed for selecting cases for trial.<sup>17</sup> Their goal apparently was to select a sample of relatively severe cases, combining some desire for representativeness with a worst-should-go-first prioritization approach.<sup>18</sup> To the extent they were striving for representativeness, their detailed process of case selection may have been more involved than necessary. Unlike extrapolation plans, where an enormous amount rides on the selection of sample plaintiffs,<sup>19</sup> informal bellwethers provide useful information even if the cases are not perfectly representative or neatly selected. Lawyers evaluate bellwether verdicts in light of the particular features of the case—the judge, the jury, the lawyers, the strength of the plaintiff’s causation case, the severity of the harm, and so on. Judges have used a wide variety of techniques to select cases for early trials, including literally picking cases from a hat.<sup>20</sup> In mass tort litigation, cases may arrive at trial without an overarching design simply because cases proceed in multiple jurisdictions. In the *Vioxx* pharmaceutical litigation, for example,

---

16. See Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571, 575 (2012) (“Because the Supreme Court’s case law has limited litigants’ ability to use the class action device to resolve mass torts on an aggregate basis as a formal matter, district courts are using *informal* procedures to facilitate settlements of mass tort cases. These innovative procedures include informational bellwether trials, a distant cousin of statistical sampling or Trial by Formula.”).

17. They divided the plaintiffs into five groups of two thousand. From each group, the special masters were to select two hundred particularly severe cases, plus twenty-five others. From each batch of two hundred selected severe cases, the plaintiffs’ liaison counsel and the city each would choose two for trial, plus the court would choose two either from the two hundred or from the additional twenty-five. Hellerstein, Henderson, & Twerski, *Managerial Judging*, *supra* note 10, at 148–52; see also *In re World Trade Center Disaster Site Litig.*, 598 F. Supp. 2d 498, 503–04 (S.D.N.Y. 2009) (Opinion Discussing Methodology for Discovery and Trials of Sample Cases).

18. See *In re World Trade Center Disaster Site Litig.*, 598 F. Supp. 2d 498, 505 (S.D.N.Y. 2009) (Opinion Discussing Methodology for Discovery and Trials of Sample Cases) (“[S]ince the claims of those most gravely injured commend themselves to highest priority, the plan provides a procedure to identify these cases, a methodology to select a representative sample for full discovery and early trial, and a firm and intensive schedule to begin trials.”); see also Hellerstein, Henderson & Twerski, *Managerial Judging*, *supra* note 10, at 174 (“With such a database, the court could select bellwether claims, not blindly or as one or another counsel conceived, but according to criteria that focused on merits and severity of injury, for those were the claims that most merited resolution and that would most likely affect similarly situated claims.”). Cf. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541 (1992) (recommending that courts prioritize trials involving asbestos claimants with serious injuries, and that they defer trials of unimpaired asbestos claimants).

19. See Lahav, *supra* note 16, at 612–18.

20. *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. June 20, 2005) (Order re: Bellwether Trial Selection) (ordering that fifteen cases be randomly drawn from a pool of potential trial cases that meet certain criteria).

the federal judge overseeing the multidistrict litigation could control only part of the early trial schedule because many of the cases were in state courts. Despite this confounding aspect to the selection of cases for trial, the early *Vioxx* trials generated information that the parties needed in order to negotiate a comprehensive settlement.<sup>21</sup> The September 11 litigation was confined to a single court because Congress legislated that cases must be brought in the Southern District of New York.<sup>22</sup> Exclusive jurisdiction gave Judge Hellerstein a level of control over bellwether trial selection that other litigation cannot—and need not—match.<sup>23</sup> In any event, actual bellwether verdicts did not prove necessary to bring the parties to settlement in the September 11 litigation; it sufficed that the trials were scheduled.<sup>24</sup>

The important point is that judges can facilitate settlement in mass disputes by managing the litigation to bring key information to the surface. Discovery and trials, sensibly sequenced, provide information about claimants and claim values. Judges facilitate settlement by scheduling trials so that parties feel pressure to take negotiations seriously.<sup>25</sup> And bellwether trials in mass litigation provide data points that can move the parties toward mass resolution.

---

21. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 278 (2011).

22. Air Transportation Safety & System Stabilization Act § 408(b)(3) (codified as amended at 49 U.S.C. § 40101) (“The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.”).

23. For a discussion of various approaches to selection of cases for bellwether trials, see Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342–65 (2008).

24. See Hellerstein, Henderson, & Twerski, *Managerial Judging*, *supra* note 10, at 156–57.

25. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.13 (2004) (“Setting a firm trial date is generally the most effective means to motivate parties to settle.”). See also Hellerstein, Henderson & Twerski, *Managerial Judging*, *supra* note 10, at 156 (“[T]he sequencing of the litigation created uncertainties that made settlement attractive to both sides. For example, with regard to plaintiffs who suffered relatively severe respiratory injuries, defendants were reluctant to face the very real possibility that juries in the first claims reaching trial might return high verdicts that would make it more costly to settle the rest of the claims.”). Although the conventional wisdom is that early trial dates push parties to settle, there is an interesting contrary argument that delays may facilitate settlement by giving plaintiffs time to adapt to injuries. See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008).

## II. JUDICIAL CONTROL OVER SETTLEMENT

We turn now from facilitation to control. In terms of constraints on judicial authority, there is an enormous difference between judicial management to facilitate settlement and judicial control over settlement terms.

In March 2010, the city and plaintiffs' liaison counsel announced that they had reached agreement on a settlement with a total amount of \$575 million to \$657.5 million. The deal was contingent upon acceptance by at least ninety-five percent of the claimants; the total amount depended on the acceptance rate, with a premium for high participation. When the attorneys informed Judge Hellerstein of the settlement, he rejected it as inadequate.<sup>26</sup> The parties renegotiated and returned with a settlement that totaled between \$625 million and \$712.5 million, with a smaller portion allocated for attorneys' fees, and with ninety-five percent of the funds allocated to those with the most severe injuries.<sup>27</sup> This time the judge granted his approval. As Judge Hellerstein explains, "The parties renegotiated and returned with a more attractive package—fair in my mind, although not perfect—and I approved it."<sup>28</sup>

The question is whether the judge acted properly in rejecting and in approving the settlement. When I ask whether the judge acted properly, I do not mean whether the initial settlement was inadequate or whether the revised settlement was adequate. Rather, I mean whether the judge had any authority to impose his own view concerning the adequacy of the settlement.

Others have made the case that judges lack the authority to approve or reject settlements in non-class mass litigation. Jeremy Grabill offers a thorough analysis of what he calls the "emerging opt-in paradigm for mass

---

26. Hellerstein, Henderson & Twerski, *Managerial Judging*, *supra* note 10, at 157 ("On March 19, 2010, Judge Hellerstein threw a bombshell into the proceedings by rejecting the settlement as inadequate.") (citing Transcript of Status Conference at 54, *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100(AKH) (S.D.N.Y. Mar. 19, 2010)).

27. *Id.* at 160 n.233, 176.

28. *Id.* In another article, Judge Hellerstein states that he understood that there were questions about his authority, but he nonetheless reviewed the settlement and approved it only after the total amount was increased and the attorneys lowered their fees: "I declined to approve the settlement, rejecting objections that I lacked authority to review settlements agreed to by counsel in individual lawsuits. Ultimately, the settlement amounts were increased, the fees were lowered, and the procedures were modified. I then gave my approval." Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 476 (2012).

tort settlements in the post-class action era.”<sup>29</sup> Grabill concludes that “there is no need or justification for judicial review of private mass tort settlements because such settlements only bind those plaintiffs who affirmatively opt in to them.”<sup>30</sup> He emphasizes that his argument against judicial review does not depend upon whether “mass tort litigation in the post-class action era can be generically described as exhibiting ‘quasi-class action’ or ‘quasi-public’ components.”<sup>31</sup> A note by Alexandra Rothman examines judicial involvement in four mass tort settlements—Zyprexa, Vioxx, Guidant, and September 11—and similarly concludes that the practice of judicial approval of non-class settlements is unwarranted, as it “removes claimant autonomy and damages the adversarial system.”<sup>32</sup>

In their article, Hellerstein, Henderson and Twerski do not directly address these arguments, but they defend Judge Hellerstein’s decision to reject the settlement and they invite a more thorough analysis of this question by procedural policy-makers.<sup>33</sup> Judge Hellerstein explains his understanding of the task he faced:

Incident to the court’s obligation to exercise judicial management to supervise the litigation for fairness and efficiency, I saw my task as twofold: First, I had to determine whether the proposed settlement was fair to the plaintiffs, substantively and procedurally. And second, I had to make sure that adequate mechanisms were in place to allow all plaintiffs to receive adequate information upon which to base their decisions regarding whether to join the settlement. Regarding the first issue, after review, I disapproved the proposed settlement plan because, considering the amount of reserves that the Captive intended to keep for future claims and the percentages

---

29. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 182 (2012).

30. *Id.*

31. *Id.*

32. Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 353 (2011).

33. Judge Hellerstein puts it this way:

On the one hand, if I was right in asserting supervisory control of the litigation and rejecting the initial settlement, then those powers should be clearly set forth so that the next judge who faces these issues does not feel overly constrained for fear of appellate reversal. On the other hand, if I was wrong, then an explicit rule should define the proper constraints. In any event, if this article contributes to a more thorough, informed analysis by those charged with formulating policy and articulating a rule (one way or another), our efforts in writing it will have been rewarded.

Hellerstein, Henderson & Twerski, *Managerial Judging*, *supra* note 10, at 177 (citations omitted).



going to the lawyers, too little would end up being paid to the plaintiffs.<sup>34</sup>

In the judge's two-part description of his task, the second part—ensuring that plaintiffs have sufficient information about the proposed settlement—is unassailable. Indeed, it goes to the heart of the matter in that it recognizes that settlement decisions belong to the parties. The problem is the first part. When the judge states that he “had to determine whether the proposed settlement was fair to the plaintiffs, substantively and procedurally,” we should ask *why* he had to do this. When called upon to adjudicate, a judge faces the job of applying law to facts with appropriate considerations of substantive and procedural fairness. But in a negotiated resolution, when the parties can decide for themselves whether to release claims in exchange for offered compensation, is it really the case that the judge “had to determine whether the proposed settlement was fair”? What gives the judge the job of telling parties the terms on which they may choose to release their claims?

If the litigation had been a class action, we would not ask this question. Had it been a class action, a settlement would have bound persons who did not affirmatively choose to participate. Because class settlements are not founded on agreement of all the participants, a class action settlement takes effect only as a form of adjudication and therefore requires the judge's decision to put the power of the court behind the resolution. This decision takes the form of a judicial determination that the settlement is “fair, reasonable, and adequate.”<sup>35</sup> The court in the September 11 litigation, however, denied class certification:

I denied class status because of the variety of illnesses alleged by the plaintiffs, the varying severity of their illnesses, the transient nature of the worksites, the varying levels of supervision governing plaintiffs' work, the variety of defendants, and the complexity of determining and evaluating pre-existing medical conditions.<sup>36</sup>

In nonetheless treating the matter as if it were a class action for purposes of judicial settlement review, the court picked up on the “quasi-class action” notion introduced by Judge Jack Weinstein in the *Zyprexa* pharmaceutical product liability litigation.<sup>37</sup> In the *Zyprexa* case, Judge

---

34. *Id.* at 175 (citations omitted).

35. FED. R. CIV. P. 23(e)(2).

36. *In re World Trade Center Disaster Site Litig.*, 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (citing Transcript of Status Conference at 31–34 (S.D.N.Y. Oct. 28, 2004)).

37. *See In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271–72 (E.D.N.Y. 2006).

Weinstein “approved” the settlement<sup>38</sup> and imposed caps on fees, explaining that the court’s involvement was needed because of the strong resemblance between mass non-class litigation and class actions:

While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court. The large number of plaintiffs subject to the same settlement matrix approved by the court, the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement, the court’s order approving and controlling a huge escrow fund, [and] other interventions by the court in controlling discovery for all claimants . . . reflect a degree of court control that supports the imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding issues such as settlement procedures.<sup>39</sup>

Other judges followed in Judge Weinstein’s footsteps, offering their approval of mass settlements and explaining their involvement on a quasi-class action theory. In the *Vioxx* litigation, Judges Eldon Fallon, Carol Higbee and Victoria Chaney expressed approval of a multi-billion dollar settlement to resolve tens of thousands of product liability claims.<sup>40</sup> In the *Guidant* defibrillator litigation, Judge Donovan Frank approved a settlement and recommended it to all of the claimants.<sup>41</sup>

What got people’s attention about Judge Hellerstein’s involvement was that, unlike the others, his review resulted in a rejection. A judge’s approval does not trouble the primary players; they are pleased. But when

38. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596 (JBW), 2005 WL 3117302 (E.D.N.Y. Nov. 22, 2005).

39. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d at 271 (citations omitted).

40. Transcript of Proceedings at 31, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) (Judge Higbee calling the settlement “a very fair resolution”); *id.* at 38 (Judge Chaney calling it “a fair and reasonable resolution”); Transcript of Status Conference at 13, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L (E.D. La. Jan. 18, 2008) (Judge Fallon stating that the settlement program “will be in the best interests of all concerned”). The master settlement agreement noted that Judge Fallon agreed to serve as Chief Administrator of the settlement. Settlement Agreement between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, § 6.1.1 (Nov. 9, 2007), available at <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> (“At the request of the Parties, The Honorable Eldon E. Fallon has agreed to preside over the Program in the capacities specified herein. For convenience, Judge Fallon will be referred to herein as the ‘Chief Administrator’.”).

41. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, Transcript (D. Minn. Dec. 17, 2007).

a judge rejects a deal that the primary players have negotiated, it is no surprise that the players complain. Thus, Judge Hellerstein's rejection gave rise to attacks and defenses. It would be a mistake, however, to focus too much on the difference between approval and rejection. The question is simply whether a judge has the authority to review a non-class settlement. If the judge lacks authority to reject the settlement, then "approval" is empty. If the judge lacks the authority to reject a settlement, the judge's "rejection" or "approval" is nothing more than the judge's opinion and should not be offered with any air of control.

Indeed, unauthorized judicial approval may cause just as much mischief as unauthorized judicial rejection. When a judge purports to *reject* a settlement that would have been acceptable to the parties, the judge deprives the parties of control over their claims. The parties have no guarantee that they will be able to renegotiate the settlement in a way that meets with the judge's approval, and therefore the judge creates a risk of depriving the parties of a negotiated resolution. The mischief potentially created by unauthorized judicial *approval* is of a different sort. Lawyers who negotiate mass settlements want the judge's blessing. To them, judicial approval offers a kind of inoculation against charges that they handled the matter improperly. Mass settlements present difficult ethical obligations for lawyers, and disputes over mass settlements are not uncommon.<sup>42</sup> If a judge's blessing takes pressure off of attorneys to comply fully with their obligations, then it does a disservice. The counterargument is that judicial review enhances the likelihood that lawyers will take their obligations seriously. Judges, however, have an interest in achieving comprehensive settlements. In this regard, a judge overseeing mass litigation has interests that align with the defendant as well as with plaintiffs' counsel, but that may run counter to the interests of claimants. Because of this, there is some risk that judicial approval may provide cover for attorneys without providing meaningful protection for parties.

More fundamentally, it is a question of power. Claims belong to claimants, not to the judge. If a claimant chooses to dismiss her claim in exchange for compensation offered by the defendant, that is the claimant's prerogative.<sup>43</sup> True, by filing a complaint, a plaintiff subjects herself to the

---

42. For a discussion of some of these disputes, see Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010).

43. Compare FED. R. CIV. P. 41(a) (discussing a plaintiff's ability to voluntarily dismiss a claim), with FED. R. CIV. P. 23(e) (class action may not be dismissed or compromised without judicial approval).

power of the court to adjudicate the claim. But adjudication and settlement flow from different power sources. The judge functions both as a potential adjudicator and as a manager of a process that may lead to a negotiated resolution, but that does not mean that the judge exercises the same power in each of these roles.

### CONCLUSION

We began with Judge Hellerstein's question: How do you bring justice to ten thousand cases? The judge who tries to answer this question, I have tried to suggest, must keep two important distinctions in mind: the line between class and non-class litigation, and the line between adjudication and settlement. In a class action, the judge not only runs the adjudicatory process but also must decide whether to approve any proposed settlement. But if the court does not certify the class, as in the September 11 clean-up litigation, then the court's role vis-à-vis settlement is limited to facilitation rather than outcome control.

The judge may facilitate settlement not only through explicit encouragement and dispute resolution techniques, but also by moving the litigation forward in ways that yield information the parties need. In particular, the judge may manage discovery to bring out essential information that the parties need in order to reach decisions about claim values. The judge also may facilitate settlement by scheduling bellwether trials that provide data points regarding outcomes and values. Unlike the judge overseeing a class action, however, the judge overseeing non-class litigation has no general power to accept or reject a settlement.

Constraints on judicial power concern more than the case at hand. Whenever a judge purports to exercise power that does not belong to the court, even if we are confident that the judge did not abuse the power, we do not know what the next judge will do. Will the next judge "reject" a fair settlement, depriving the parties of a resolution that would have satisfied them? Will the next judge "approve" an unfair settlement, providing unwarranted encouragement for claimants and undeserved insulation for lawyers? It is no answer to say that bad decisions can occur in both adjudication and settlement. Judges are well situated to adjudicate; they are not equally well situated to decide for individuals whether those individuals should be willing to release their claims in exchange for an offered compromise. On the question of whether justice was done in the September 11 clean-up litigation—that is, whether the settlement amount and distribution sufficed in light of the strength of the claims—I have no sound basis for an opinion. But on the question of whether the decision to

settle belonged to the litigants rather than to the judge, the answer is straightforward: the decision belonged to the litigants.